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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 665

ANGELO HERNDON,

Appellant,

vs.

THE STATE OF GEORGIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

Statement of Jurisdiction.

In compliance with Rule 12 of this Court appellant submits herewith his statement showing the basis of this Court's jurisdiction in the above entitled cause.

Opinions Below.

The original opinion of the Supreme Court of Georgia (R. 225-274) [1] is reported in 178 Ga. 832. Its opinion upon

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[1] References to the original record are to the pages of the record certified by the Clerk of the Supreme Court of Georgia which has not yet been printed. At the time of the preparation of this statement the petition for rehearing and the opinion upon the denial of the petition for rehearing have not yet been included in the certified record. References to the petition for rehearing are given as (P. R.) and references to the opinion denying the petition for rehearing are given as (O. D. R.).

the denial of the petition for rehearing (O. D. R. 1-11) is reported in 176 S. E. 620 but has not yet been officially reported. No opinion was rendered by the trial court. Its charge to the jury appears at R. 187-199.

Jurisdiction.

The jurisdiction of this Court to review the judgment of the court below is conferred by Section 237 of the Judicial Code as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928.

(1)

Appeal Timely Taken.

The original judgment of the Supreme Court of Georgia was entered May 24, 1934 (R. 274). That court entertained a petition for rehearing filed August 20, 1934 (R. R. 8-11) and denied the petition for rehearing September 28, 1934 (O. D. R. 1-10). The petition for appeal was presented to Hon. Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia, on December 19, 1934, and the appeal was allowed by him on that date.

(2)

Finality of Judgment.

The judgment from which the appeal is taken is final both in form and substance. The judgment affirms a judgment of conviction and disposes of all elements of the controversy.

(3)

Judgment of the Highest Court.

The judgment of the Supreme Court of Georgia is that of the highest court in which, under the laws of the State, such judgment could be had.

(4)

Validity of a State Statute Drawn Into Question and Decision in Favor of Its Validity.

In this case appellant contended in the court below that a statute of the State of Georgia as construed and applied was repugnant to the Fourteenth Amendment to the Constitution of the United States and the decision rendered by the court below was in favor of its validity.

(a)

The Statute.

The statute, the validity of which was drawn into question, is Section 56 of the Penal Code of Georgia (Acts 1871-1872, pp. 19, 20) which provides:

> Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection.[2]

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[2] The punishment for an attempt to incite insurrection is contained in Section 57 of the Penal Code (Acts 1866, pp. 152, 153, as amended by Acts 1871, pp. 19, 20) which is as follows:

> Any person convicted of the offence of insurrection, or an attempt to incite insurrection, shall be punished with death; or, if the jury recommend to mercy, confinement in the penitentiary for not less than five nor more than twenty years.

Insurrection is defined in Section 55 of the Penal Code (Acts 1866, pp. 152, 153) as follows:

> Insurrection shall consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence.

In its original opinion, the Supreme Court of Georgia construed Section 56 to make criminal all attempts to persuade others to combine in forcible resistance to the State, no matter how remote the time when it is advocated or intended that force should be employed, and no matter how unlikely it is that the attempted persuasion will lead to acts which are unlawful or which threaten the sovereignty of the State. In its opinion upon rehearing the Supreme Court adopted the following modified construction:

> "Force must have been contemplated, but the statute does not include either its occurrence or imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would (be) sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce."

Thus, the only limitation imposed by the final construction is that the defendant must have intended that those whom he attempted to persuade should resort to violence at a time "within which he might reasonably expect his influence to continue to be directly operative" as a stimulus to such action.[1] Both upon original hearing and upon rehearing, the Supreme Court of Georgia, after setting forth its interpretation of the statute, concluded that the evidence supported a conviction under the statute as construed.

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[1] This does not mean that objectively there must be reasonable grounds for believing that the attempted persuasion would be effective at all. The qualification has reference only to the defendant's intention.

(b)

Nature of the Case.

On July 11, 1932 (R. 122) appellant, a Negro, was arrested without a warrant (R. 239) as he opened his mail box, No. 339, in the Federal Post Office Building in Atlanta, Georgia (R. 97) with the key in his possession (R. 97). Upon the instructions of Assistant Solicitor General Stephens the police had been lying in wait for anyone who came to the box because a Commissioner had complained about receiving a "scurrilous" letter bearing that box number (R. 102). The alleged letter was never offered in evidence nor were its contents ever divulged.

No charge of any kind was made against appellant until eleven days after his arrest, when a writ of habeas corpus was sued out to effect his release (R. 122). The court said upon the hearing of the writ that appellant would be released on the following day unless an indictment should be obtained. Appellant was indicted on July 22, 1932, for attempting on July 16, 1932, to incite insurrection (R. 7-11).[4]

The evidence introduced against appellant at the trial consisted of the testimony of three witnesses and certain documents, some of which related to the Communist Party. A part of these documents was in a box under appellant's arm at the time of his arrest; the remainder were found in his room when it was later searched without a warrant (R. 99, 239). The three State witnesses were Watson, the arresting officer (R. 97), Clonts, a clerk in the post office (R. 100), and Assistant Solicitor General Stephens (R. 102).

Clonts' testimony concerned only the identity of appellant as lessee of the post office box which he was opening at the

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[4] On July 16, 1932, and for a number of days before and after that date appellant was actually in jail.

time of his arrest. Watson and Stephens identified the documents in evidence as taken from appellant's person or his room. Both testified that appellant after his arrest had stated that he was an organizer for the Communist Party and Stephens testified that appellant had described his duties as an organizer: "To call meetings, disseminate information regarding the party at these meetings; to distribute literature, to secure members for the meetings and generally to work up an organization of the Communist Party in Atlanta" (R. 104). Stephens further testified that appellant had stated that he held or had attended two or three meetings and had "five or six actual members" of the Communist Party in Atlanta (R. 105).

Neither Watson nor Stephens testified to further knowledge of any offense or activities by appellant. Neither had seen appellant before his arrest nor had any personal knowledge of his previous activities (R. 99, 107, 109, 110). Stephens testified that appellant stated that he was the author of one or two of the documents in evidence (Nos. 30 or 31, R. 183-6), both of which were characterized by the court below as "more or less harmless" (R. 256).

The documents seized by the police officers and which make up the balance of the State's evidence, consist in part of literature published in the interests of the Communist Party, and one or more books of radical economic character apparently used only for appellant's own perusal.[5]

Appellant was shown to have distributed copies of two of the papers in evidence. These were the two described by the court below as "more or less harmless." Of the remaining documents thirteen were mentioned in the court's

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[5] Copies of the Bible, the "Atlanta Constitution" and other literature found in appellant's possession were not offered in evidence by the State (R. 110).

opinion and may thus be assumed to have influenced the decision particularly. Nine of these thirteen were membership books of the Communist Party (3-11, R. 146, 151), which contained a general description of the Communist Party, its aims and purposes. Three of the thirteen documents, "The Communistic Position on the Negro Question" (Document 13, R. 156-157), "An Appeal to Southern Young Workers" (Document 16, R. 169-170), and "Party Organizer" (Document 17, R. 170) were Communist publications containing party propaganda. The other document relied on by the court below, a book entitled "Communism and Christianism" (Document 15, R. 161-171) was not shown to have any connection with the Communist Party and was apparently mere personal reading matter. The documents which had some connection with the Communist Party contain no exhortation or incitations to violence,[6] immediate or remote. The documents expound and advocate the general aims of the Communist Party such as unity of all workers and organization to improve the conditions of the working class. They advocate certain specific measures such as equal political and economic rights of Negroes, "self-determination for the Black Belt," punishment of lynchers, disbanding of military units, abolition of child labor, minimum wages, maximum working hours, strikes and boycotts. Occasionally there is an unexpounded use of the words "revolution" or "revolutionary" in describing the cooperative activities of the Party members. Nowhere is it indicated that revolution by violence is implied; on the contrary the context shows that the words are used in the same sense as the word "revolution" is used in the common phrase "industrial revolution," as a description of signifi-

[6] The only use of the word is in "Communism and Christianism" in a context which shows that it was not a word of incitation.

cant change. The documents did not advocate forcible resistance to the authority of the State.

At the trial appellant made a statement to the court in which he stated his belief that the real reason for his arrest was that he had organized an appeal by the unemployed to the city authorities administering relief. In the course of this statement he expressed his judgment that "the system we are living under is on the verge of collapse and that the unemployed have a right to demand food and shelter from the government." Nothing in the statement indicated that he had urged others to resist the authority of the State (R. 118-128) nor was it reasonable to imply from it that appellant thought the time ripe for violent action. Thus all the evidence at the trial established only that Herndon had admitted being an organizer for the Communist Party and that he had in his possession the documents which have been described above.

At the conclusion of the evidence the trial court charged the jury in part as follows:

> "• • • that advocacy, however reprehensible morally, is not sufficient to convict the defendant where there is no evidence to indicate that the advocacy would be acted upon immediately. In order to convict the defendant, Gentlemen, it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or was advocated."

The jury returned a verdict of guilty but recommended mercy, fixing the penalty at from 18 to 20 years in the penitentiary (R. 12) and sentence was passed accordingly (R. 202). A motion for a new trial (R. 16-80) was denied by the trial court (R. 80).

On writ of error the court below impliedly rejected the trial court's construction of the statute requiring that "im-

mediate serious violence against the State of Georgia was to be expected or was advocated,'" and instead interpreted the statute upon rehearing, as has been pointed out above, to require only that violence must have been intended at a time "within which he might reasonably expect his influence to continue to be directly operative." In terms of this construction, which materially differed from that of the trial court, the Supreme Court evaluated the evidence and concluded that it supported the judgment of conviction.

(c)

Appellant's Contentions.

Appellant contends:

(1) That the statute as construed and applied by the Supreme Court of Georgia unreasonably restricts appellant's freedom of speech and of assembly and is, therefore, invalid under the due process clause of the Fourteenth Amendment to the Federal Constitution.

(2) That the statute as construed by the Supreme Court of Georgia contains a standard of guilt which is so vague and uncertain that it is not susceptible of reasonable application and, therefore, is invalid under the due process clause of the Fourteenth Amendment to the Federal Constitution.

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[1] The original construction of the statute by the court below was in connection with its consideration of the question whether the evidence was sufficient to support the verdict. Before embarking on the discussion of the construction the court below said in its original opinion:

> "Before proceeding to examine the evidence, however, it is proper to determine the exact nature of the offense alleged to have been committed" (R. 252).

(5)

Federal Questions Were Properly Raised in the Court Below and this Court Has Jurisdiction of the Appeal.

Appellant contended in his petition for rehearing in the court below that the construction and application of the statute by the Supreme Court of Georgia rendered it invalid under the due process clause of the Fourteenth Amendment. The Supreme Court's interpretation of the statute in its first opinion differed radically from that of the trial court under which the case was submitted to the jury. The latter required a finding that immediate serious violence against the State of Georgia was to be expected or was advocated; the former rendered immaterial both the immediacy of the violence advocated and the danger that violence would ensue at any time. Thus the statute applied by the Supreme Court in holding the evidence sufficient to sustain the verdict and judgment imposed an entirely new and far more rigorous standard of liability than that imposed by the statute as interpreted by the trial court, and obviously an attack upon the validity of the statute as construed by the appellate court raises a Federal question which is different from and more serious than the question of the validity of the statute as construed by the trial court. On writ of error to the court below appellant was reasonably content to rest his case upon the sufficiency of the evidence as a matter of State law to meet the standard declared by the trial court, and upon the other questions raised at the trial, which are not presented here. He was not required to anticipate in the trial court that the appellate court would not consider the sufficiency of the evidence under the standard of liability laid down by the trial court, but would rather consider its sufficiency under another standard which is more rigorous, and which renders the statute invalid

under the Fourteenth Amendment. The Federal question of the validity of the statute as interpreted and applied by the Supreme Court arose in that Court from its "unanticipated act" in giving the statute "a new construction which threatened rights under the Constitution" (*American Surety Co.* v. *Baldwin*, 287 U. S. 156, 164). It was, therefore, seasonably presented upon the petition for rehearing.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673;
Missouri v. *Gehner*, 281 U. S. 313;
Cf. *Saunders* v. *Shaw*, 244 U. S. 317;
Grannis v. *Ordean*, 234 U. S. 385;
Great Northern R. Co. v. *Sunburst Oil Ref. Co.*, 287 U. S. 358, 367;
American Surety Co. v. *Baldwin*, *supra*.

The validity of the statute as finally interpreted by the Supreme Court in its opinion denying the petition for rehearing is accordingly properly before this Court. It is immaterial that the final interpretation modified somewhat that contained in the original opinion, for the final interpretation also effectively omits those material conditions of liability which rendered the statute innocuous as interpreted by the trial court and, in addition, for the first time renders the standard of liability so uncertain as to be incapable of enforcement. It is also immaterial that the State court refused to consider the Federal questions presented in the petition for rehearing. It is not a condition of this Court's jurisdiction that the Federal questions be considered by the State court, but only that they be seasonably presented there. A claim of Federal right is denied "as well by the refusal of the State court to decide the question, as by an erroneous decision of it." (*Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282.)

This Court has jurisdiction on appeal to determine whether a State statute as construed and applied by the

highest court of the State is in conflict with the Federal Constitution, (*Fiske* v. *Kansas*, 274 U. S. 380, 385-386; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 288-289), and where necessary to vindicate Federal rights, this Court will consider whether there is any evidence to support the conclusions of fact of the State court (*Fiske* v. *Kansas, supra*).

(6)

Substantial Federal Questions are Presented.

1. Whether a State may make criminal any attempt by persuasion to induce others to combine together for the purpose of achieving fundamental changes in the economic, social and political structure of a State or other portion of the United States, provided only that the person making the attempt intended that forcible resistance to the State should occur "at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce," is a substantial Federal question.

The statute, as construed by the court below, is invalid under the criterion enunciated by this Court in *Schenck* v. *United States*, 249 U. S. 47 (1919) that to justify an abridgement of the freedom of speech guaranteed by the First Amendment the words spoken or otherwise disseminated must be used "in such circumstances" and be "of such a nature as to present a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" (249 U. S. 47, 52). See also *Debs.* v. *United States*, 249 U. S. 211. Whether or not that criterion has been departed from has never been authoritatively determined. Cf. *Abrams* v. *United States*, 250 U. S. 616; *Pierce* v. *United States*, 252 U. S. 239. That freedom of speech and assembly are comprehended within the "liberty" guaranteed by the due process clause of the Fourteenth Amend-

ment is, however, settled—(*Gitlow* v. *New York*, 268 U. S. 652, 666; *Whitney* v. *California*, 274 U. S. 357, 362, 371, 373; *Fiske* v. *Kansas*, 274 U. S. 380, 382; *Near* v. *Minnesota*, 283 U. S. 697, 707; *Stromberg* v. *California*, 283 U. S. 359, 368; *Hamilton* v. *Regents of University of California*, No. 55, October Term 1934, decided December 3, 1934). And in two cases a minority of the Court has affirmed the applicability to the guaranty of the Fourteenth Amendment of the clear and present danger test set forth in *Schenck* v. *United States, supra*, while the majority of the Court has sustained the application of the State statute on the ground that the passage of the act, making criminal the advocacy of the overthrow of the Government by force or the formation of an association for the purpose of such advocacy, evidenced a legislative finding that the proscribed utterance or association involve great danger of the type of substantive evil which the State may prevent. (*Gitlow* v. *New York, supra; Whitney* v. *California, supra.*)

The Georgia statute, as construed by the highest court of the State, cannot be supported by either criterion. The degree of danger of substantive evil and the immediacy of the violence advocated are expressly declared to be immaterial. Moreover the statute, unlike those presented in the *Gitlow* and *Whitney* cases, does not declare that specific utterances or associations are criminal; it punishes "any attempt by persuasion or otherwise" to achieve a specific result—the inducement of others to combine in resistance to the State that will at some time be forcible in nature. It is thus a case where, as in *Schenck* v. *United States, supra*, "The statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results" (*Gitlow* v. *New York, supra*, pp. 670-671).

It was said in *Gitlow* v. *New York, supra,* p. 671, that before a statute of this sort may be applied so as to make a particular utterance criminal, "it must necessarily be found as an original question, without any previous determination by the legislature, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection." That inquiry is precisely the one which the trial court's interpretation of the statute required and the construction of the court below excluded. Moreover, even if the present statute were regarded as in the same class with those involved in the *Gitlow* and *Whitney* cases, its validity was not determined by those decisions. The New York statute was passed in 1902 after the assassination of President McKinley by an anarchist and was applied in a period of post-war emergency, when the New York legislature was considering further means to suppress what it regarded as wide-spread seditious activity (see *"Revolutionary Radicalism,"* The Report of the Joint Legislative Committee of the State of New York Investigating Seditious Activities, 1920); the California statute was passed shortly before its application at a time when, according to its preamble "large numbers of persons are going from place to place in this State, advocating, teaching and practicing criminal syndicalism" (See concurring opinion of Brandeis, J., *Whitney* v. *California, supra,* p. 378). But the Georgia statute was passed in 1866, an adaptation of a statute directed against the fomenting of insurrection among the slaves which goes back to 1804 (See the Act of May 19, 1804, A Compilation of the Laws of Georgia, 1800-1810 (Augusta, 1812); Georgia Penal Code (1817), Div. III, § 4). With one possible exception Section 56 apparently languished unused until it was resurrected in the present case to prevent discharge of appellant from custody following the admonition of the court on a *habeas*

corpus hearing that appellant would be discharged unless he was indicted. It cannot be regarded, in any respect, as a legislative finding that attempted persuasion to join the Communist Party or to induce others to support the program of that party gives rise to grave danger of such substantive evil as the State may prevent. The presumption of constitutionality attributed to the statutes in the *Gitlow* and *Whitney* cases is one of fact which is rebuttable (*Borden's Farm Products Co., Inc.* v. *Baldwin*, No. 296, October Term, 1934, decided December 3, 1934). The sovereignty of Georgia is secure[8] and there is no evidence whatever that appellant sought or urged its violent overthrow. It cannot reasonably be believed that in Georgia "the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion." See *Whitney* v. *California*, *supra*, concurring opinion of Mr. Justice Brandeis, p. 377.

The construction of the statute by the court below cannot be regarded as a reasonable exercise of the State's police power to protect it against violent assault and a statute so construed must be regarded as an arbitrary interference with the right of appellant to express his views and to organize those with similar views for political action.

The evidence upon which appellant was convicted is summarized in the statement of the nature of the case, *supra*

[8] Appellant admitted that he had only five or six actual members of the Communist Party in Atlanta (R. 104). In 1932 the Communist candidate for President of the United States polled 23 votes in the whole State of Georgia, and in 1928 the Communist candidate polled a total of 64 votes in the entire State. In 1924 no votes were cast for the Communist candidate. In 1920 there was no Communist candidate. Georgia's steady and almost unanimous adherence to the tenets of one of the major American political parties, demonstrates its tenacity of political opinion.

(p. 5). Under *Fiske* v. *Kansas*, 274 U. S. 380, *supra*, the evidence did not justify the conviction of appellant under the statute as construed by the court below and application of the statute to appellant accordingly deprived him of his liberty without due process of law in violation of the Fourteenth Amendment.

2. Whether the statute, as construed by the Supreme Court of Georgia, contains a standard of liability which is so vague and uncertain that it is not susceptible of reasonable application and, therefore, is invalid under the due process clause of the Fourteenth Amendment is also a substantial Federal question. This question arises from the construction of the statute by the court below upon rehearing. Under its construction it is not necessary to guilt that the defendant should actually believe that his efforts would cause violent resistance to the authority of the State. A jury, possibly influenced by the passion and prejudice engendered by the views of an unpopular minority, would be free to speculate whether a defendant should reasonably have believed that his influence would, at any time, however remote, be operative in causing an insurrection. The influence of an expression of opinion in a political or economic field, the period required for persuasion to become effective, the trajectory of an idea involving action by large numbers of people are completely outside the experience of ordinary men. The construction of the statute by the court below leaves the criteria of guilt completely indefinite and thus the statute becomes too vague and uncertain for valid enforcement.

See

United States v. *L. Cohen Grocery Co.*, 255 U. S. 81;
Connally v. *General Construction Co.*, 269 U. S. 385;
Standard Chemicals & Metals Corp. v. *Waugh Chemical Corp.*, 231 N. Y. 51.

Particularly where the statute limits the free exercise of constitutional rights on penalty of death, it is necessary that the rules of permissible conduct must be reasonably definite so that the citizen may know where the line is drawn and so that, being fairly on the right side of the line, he may not be deemed to have crossed it when inflamed passions rule men's decisions.

Wherefore it is respectfully submitted that the appellant in the above entitled cause comes within the proper jurisdiction of this Court.

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(5891-C)